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IN THE

Supreme Court of the United States

October Term, 1966

No. 654

ROBERT E. RUTHERFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that the Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Rutherford v. United States,* which became final in the Court below on August 11, 1966.

Citations to Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in (1966) ..... F. 2d ..... and is reproduced at pages 10-19 of the Appendix to this petition (hereinafter "App.").

None of the opinions or orders of the United States District Court for the Eastern District of Washington are reported. The original opinion of the District Court

denying the Government's request for an order compelling Rutherford to testify is reproduced at App. 1 and the accompanying order is reproduced at App. 5. The District Court order of June 23, 1965, rescinding the original order and directing Rutherford to testify, is reproduced at App. 6. The District Court order of June 24, 1965, adjudging Rutherford in contempt is reproduced at App. 7.

Jurisdiction.

The judgment below was entered by the Court of Appeals August 11, 1966. The issuance of the mandate of that Court has been stayed until the disposition of this petition for writ of certiorari by order entered September 9, 1966. The time for filing this petition has been extended to and including October 10, 1966, by order of Justice Douglas. Jurisdiction to review the judgment in question is conferred on this Court by 28 U.S.C. § 1254(1).

Questions Presented.

1. Does the Antitrust Immunity Statute provide immunity for testimony given by a witness called by the Government in a civil damage action under Section 4A of the Clayton Act?

2. Can a witness be compelled to testify when the immunity granted covers only part of his testimony?

3. Can a witness who has been offered immunity be compelled to testify when the immunity offered protects him from criminal prosecution but does not protect him from infamy and disgrace?

Constitutional Provisions and Statutes Involved.

Amendment V, Constitution of the United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Antitrust Immunity Statute, 32 Stat. 903-904

"That for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated out of any money in the Treasury not heretofore appropriated, to be

expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

Section 4A of the Clayton Act, 15 U.S.C. § 15a

"Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit."

False Claims Act, 31 U.S.C. § 231

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the

United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equip-

ments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Statement of the Case.

The petitioner, Robert E. Rutherford, is an officer of Carnation Company of Washington (Carnation). In August, 1962, the United States commenced a civil suit against Carnation and Inland Empire Dairy Association (Inland) in the United States District Court for the Eastern District of Washington. The complaint sought damages and penalties under the statute commonly known as the False Claims Act and, alternatively, damages under Section 4A of the Clayton Act.[1]

During the Government's pretrial discovery in this civil suit, counsel for the Government took the deposition of Rutherford in the presence of United States District Judge Charles L. Powell. Rutherford refused to answer the questions propounded to him by Government counsel on the ground that the answers might tend

[1]In March, 1962, Rutherford had testified before a Federal Grand Jury investigating possible antitrust violations by Carnation and Inland. At that time he had refused to waive immunity granted by the Antitrust Immunity Statute. An officer of Inland waived immunity and testified. Carnation, Inland and Inland's officer were indicted for antitrust violations and all defendants were convicted and fined on their pleas of *nolo contendere*. This criminal case led to the filing of the civil action.

to incriminate him, thereby invoking the Fifth Amendment of the Constitution of the United States. On the same ground, Rutherford also refused to answer questions proposed to him on cross-examination by counsel for Inland, including the following:

> "Mr. Rutherford, on or about March 14, 15 and 16, of 1962, you testified before a federal grand jury in Spokane, Washington. Did you or did you not give testimony at said proceeding which was not the truth, the whole truth, and nothing but the truth?"

Judge Powell advised Rutherford that he had immunity under the Antitrust Immunity Statute and ordered him to answer the questions asked by counsel for the Government and by counsel for Inland. When Rutherford again refused to answer the questions, Judge Powell adjudged him to be in contempt of court, and committed him to the custody of the Attorney General for imprisonment for a term of 90 days. The sentence was stayed pending appeal, and the order provided that Rutherford would be afforded an opportunity to purge himself of contempt within 60 days after the entry of a final order of the appropriate appellate court sustaining the contempt order.

Petitioner appealed the order of the District Court to the United States Court of Appeals for the Ninth Circuit, which affirmed the contempt order. The Court of Appeals concluded that the Antitrust Immunity Statute is applicable to testimony given in civil damage actions brought by the Government under Section 4A of the Clayton Act and that Rutherford would have complete immunity even though the Section 4A claim

was coupled with a claim under another statute which does not contain an immunity provision.[2] The Court of Appeals apparently assumed that the immunity would also cover Rutherford's cross-examination testimony, but did not discuss the question in its opinion. Finally, the Court of Appeals concluded that this Court's decisions in *Brown v. Walker* (1896), 161 U.S. 591, 40 L. Ed. 819, and *Ullman v. United States* (1956), 350 U.S. 422, 100 L. Ed. 511, are controlling on the question whether persons who have been offered immunity can be compelled to testify without violating the Fifth Amendment.

Reasons for Granting the Writ.

1. The Decision Below Should Be Reviewed in Order to Determine Whether Witnesses in Antitrust Civil Damage Actions Are Entitled to Immunity.

Every year hundreds of businessmen are called as witnesses in antitrust civil damage actions. Such businessmen have a vital interest in knowing whether their testimony will expose them to criminal prosecution by providing the Government with evidence against them or will shield them from prosecution by creating immunity for all offenses which are related to their testimony.

Until now it has generally been assumed that the Antitrust Immunity Statute does not apply to testimony

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[2]The Court of Appeals cited its dictum in *Kronick v. United States* (1965), 343 F. 2d 436, as support for the latter conclusion. Judge Powell had denied the Government's original motion to compel Rutherford to testify because the Antitrust Immunity Statute would not cover testimony relating to the False Claims Act. See App. page 16. Judge Powell reversed himself after *Kronick* was announced.

in civil damage actions. The Court of Appeals for the Second Circuit held that the Immunity Statute is inapplicable to private damage actions in *H. Wagner & Adler Co. v. Mali* (2d Cir. 1935), 74 F. 2d 666. That decision has never been challenged during the past 30 years by either a private plaintiff seeking to compel self-accusatory testimony on the theory that the witness would receive immunity or by a defendant seeking to dismiss criminal charges on the theory that he has received immunity by virtue of his testimony in a prior civil case.

The decision below has upset the long-established law. The Court of Appeals attempted to resolve the question of the applicability of the Immunity Statute to civil damage actions brought by the Government under Section 4A of the Clayton Act by first noting that the Immunity Statute is part of a 1903 Appropriation Act to provide funds for the enforcement of the antitrust laws in the courts. It concluded from this that the Immunity Statute is only applicable to testimony in court proceedings to enforce the antitrust laws.

Then the Court of Appeals declared:

> "Our holding is based on the conclusion that a civil antitrust damage action constitutes enforcement of the antitrust laws and is a 'proceeding,' or 'suit' within the meaning of 15 U.S.C. § 32.
>
> ". . . The Senate report accompanying the bill which ultimately became 15 U.S.C. § 15a, contains language which makes it clear that Congress considered private antitrust actions to be of prime importance in the enforcement of the antitrust laws and the nation's antitrust policies.

> The Government by statute has been afforded the status of a private party for purposes of instituting damage actions. If private actions generally are viewed as vehicles for enforcing the nation's antitrust laws, it is difficult to conclude that Government damage actions do not also enforce the antitrust laws. . . ." App. 10, 14-15.

The Court of Appeal's conclusion that the Immunity Statute applies to all civil damage actions has created a direct conflict of authority which will necessarily leave antitrust counsel throughout the country in a quandary in advising their clients. Such counsel must guess whether a particular court will follow the new Ninth Circuit rule and hold any witness in contempt who refuses to testify in such actions or will follow the long-established Second Circuit rule and uphold the use of such testimony as evidence against the witness in a criminal prosecution.

This dilemma is not an unreal one. In the recent case of *United States v. Welden* (1964), 377 U.S. 95, a defendant testified before a Congressional Committee on the mistaken assumption that his testimony would entitle him to immunity under the Antitrust Immunity Statute. This Court upheld the use of that testimony as evidence against the defendant in a criminal prosecution. Petitioner submits that the Court should take this opportunity to determine the applicability of the Antitrust Immunity Statute to civil damage actions *before* it is confronted with another *Welden* case.

2. The Decision Below Is Based Upon the Premise That Private Damage Actions Are "Enforcement Proceedings" Within the Meaning of the 1903 Appropriation Act.

The Court of Appeals reached the conclusion that private damage actions are "enforcement proceedings" because it looked to the wrong sources. It should have looked to the language and history of the 1903 Appropriation Act in order to determine what that Congress meant by "enforcement proceedings" instead of looking to the 1955 legislative history of Section 4A.

If the Court of Appeals had looked to the language of the 1903 Appropriation Act, as this Court's decision in *United States v. Welden, supra,* required it to do,[3] the Court of Appeals would have discovered that the appropriation was passed to provide funds to employ special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under the antitrust laws. It should have been evident from this that when the 1903 Congress spoke of "enforcement proceedings", it meant proceedings in which such agents and counsel would participate.[4] Government agents and

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[3]The immunity proviso is found at 15 U.S.C. § 32. The entire paragraph of the Appropriation Act must be considered in order to determine what testimony is covered by the immunity provision. *United States v. Welden, supra.*

[4]In 1903, there were only three types of antitrust actions: criminal actions brought by the Government, civil injunction suits brought by the Government, and damage actions brought by private plaintiffs. Congress did not give the Government a civil damage remedy until it enacted Section 4A of the Clayton Act some 52 years later. Therefore, the agents and counsel whose salaries were paid by the appropriation only participated in penal and injunctive actions.

counsel do not participate in private damage actions. Therefore, the Court of Appeals erred when it concluded that the immunity provision is applicable to private damage actions.[5]

The Court of Appeals correctly concluded that private and Government damage actions must be treated alike for immunity purposes. The legislative history of Section 4A does show that the Congress which created that remedy intended that the Government should be treated like any other buyer of goods. In explaining why the bill did not provide treble damage for the Government, the Senate Committee Report said:

> "The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered."
>
> S. Rep. No. 619, 84th Cong., 1st Sess. (1955); U.S. Code Cong. & Ad. News (1955), Vol. 2, p. 2330.

If Congress did not intend to provide immunity for testimony in any damage action, then the language which Congress used should be interpreted to accomplish that result.

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[5]The Court of Appeals for the Second Circuit concluded that the Immunity Statute does not apply to private damage actions for precisely this reason. See *H. Wagner & Adler Co. v. Mali, supra.*

3. The Decision Below Should Be Reviewed Because the Court of Appeals Erred in Assuming That the Antitrust Immunity Statute Would Cover All of Rutherford's Testimony.

Assuming for the sake of argument that the Antitrust Immunity Statute applies to Section 4A actions, the Immunity Statute would not adequately protect Rutherford from the hazard that his testimony would be used in criminal proceedings against him. The Antitrust Immunity Statute applies at most to testimony elicited by Government counsel which relates to an antitrust claim. See *United States v. Standard Sanitary Mfg. Co.* (E.D. Pa. 1911), 187 Fed. 232; *E. H. Rohde Leather Co. v. Duncan & Sons* (W.D. Wash. 1926), 15 F. 2d 103; *H. Wagner & Adler Co. v. Mali, supra.* Rutherford was ordered to answer questions of Government counsel relating to the False Claims Act claim and to answer questions asked by Inland's counsel. The Immunity Statute is clearly not applicable to either of those types of testimony.

Rutherford's problem is not unique. It is now common practice for the Government to couple Section 4A claims with claims under other statutes which provide no immunity. Moreover, antitrust claims or charges in penal or injunctive actions can also be coupled with nonimmunity claims or charges. Every witness in such a mixed action must determine at his peril whether a particular question relates to the antitrust claim and exposes him to a contempt judgment if he refuses to answer or relates to the other claim and exposes him to a criminal prosecution under some other state or federal statute if he does answer.

The Court of Appeals attempted to resolve this dilemma by presuming that it did not exist. The Court of Appeals declared that Rutherford has nothing to fear because "it will be conclusively presumed, as in *Kronick*, that the testimony which the Government intends to elicit from Rutherford, will be germane to the antitrust claim, thus affording him immunity as to all of this testimony in this cause." App. 10, 17-18.

It seems self-evident that the problem which would arise if petitioner gave testimony which related only to the False Claims Act claim cannot be resolved by presuming in advance that there will be no such testimony. The testimony either will or will not fall into a category which Congress has declared to be immune and neither the Court of Appeals for the Ninth Circuit nor any other court has any power to immunize by a presumption any future testimony which does not in fact come within a category which Congress has declared to be immune.

The opinion in *H. Wagner & Adler Co. v. Mali, supra,* permits a witness to refuse to give any answer which he reasonably believes might lead to disclosures which only relate to nonimmunity claims. Thus, the decision below on the applicability of the Antitrust Immunity Statute to mixed actions has created still another conflict between the Second and Ninth Circuits which should be resolved by this Court.

A similar dilemma arises whenever a witness for the Government in any antitrust case is questioned on cross-examination by a defendant. Since a defendant has no power to grant immunity, such a witness is not protected if he reveals anything which was not disclosed on direct examination.

Rutherford was confronted with that problem. Inland's counsel asked questions which were related to a different period of time than the questions of the Government's counsel and also asked questions which were designed to show that Rutherford's testimony before the Grand Jury was false. The District Court ordered Rutherford to answer those questions and adjudged him in contempt for failing to do so. The Court of Appeals attempted to resolve that problem by failing to mention it.

The Court of Appeals had to assume that the Antitrust Immunity Statute applies to cross-examination testimony. Since the District Court gave petitioner one sentence for both contempts, the Court of Appeals must have concluded that both findings of contempt were proper when it affirmed the judgment of the District Court. See *Shuttlesworth v. Birmingham* (1965), 382 U.S. 87, 15 L. Ed. 2d 176. That conclusion is in direct conflict with the long-standing rule of *United States v. Standard Sanitary Mfg. Co., supra,* that immunity does not extend to testimony elicited by a defendant.

4. This Court's Decisions in Brown v. Walker and Ullman v. United States Should Be Reconsidered Because Those Decisions No Longer Reflect the Philosophy of the Court.

Assuming that the Antitrust Immunity Statute did apply to all of Rutherford's testimony, he should not have been held in contempt for refusing to give self-accusatory testimony. The Immunity Statute could not protect him from the assault upon his dignity which occurs whenever a witness is compelled to confess his crimes to others or make statements which would lead

others to conclude that he has been engaged in criminal activities. Such assaults upon the dignity of a witness frustrate the primary purpose of the privilege.

It should be noted that this case does not raise the question of the constitutionality of immunity statutes as such. This case does raise the question whether the Fifth Amendment is violated when a witness who refuses to trade his constitutional privilege for a grant of immunity is compelled to testify. No decision of that question could prevent Congress or the states from offering immunity from prosecution to witnesses in order to induce witnesses to waive their privilege.

This Court did hold in *Brown v. Walker, supra,* and *Ullman v. United States, supra,* that a witness who has been offered immunity can be compelled to confess his crimes. The Court did so because the *Brown* and *Ullman* majorities concluded that the sole purpose of the privilege is to protect an individual from the use of his involuntary statements or the fruits thereof in criminal proceedings against him.[6]

The more recent decisions of this Court have recognized, as did Mr. Justice Douglas' dissent in *Ullman,* that the function and historical purpose of the privilege is much broader. Justice Douglas said:

> "My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved."
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> 350 U.S. at 445-446, 100 L. Ed. at 528.

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[6]Justice Frankfurter said in *Ullman* that the "sole concern" of the privilege is "with the danger to a witness forced to give testi-

In *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, the Court acknowledged that the privilege reflects a complex of values including society's concern with the individual's right "to a private enclave where he may lead a private life", the respect which Government "must accord to the dignity and integrity of its citizens", and the Government's duty "to respect the inviolability of the human personality." 384 U.S. at 460, 16 L. Ed. 2d at 715. The Court concluded that "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' " *Ibid.*

In *Tehan v. Shott* (1966), 382 U.S. 406, 15 L. Ed. 2d 453, the Court concluded that the primary purpose of the privilege is to protect the individual's interest in preserving his dignity and privacy. The Court expressed that conclusion when it said that "the Fifth Amendment's privilege against self-incrimination is not an adjunct of the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." 382 U.S. at 416, 15 L. Ed. 2d at 460.

Those values are disregarded whenever a witness is forced to confess his crimes to others. An interrogator violates the constitutional rights of the witness whether he extracts the statements from the witness for

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mony leading to the infliction of 'penalties affixed to the criminal acts'. . . ." 350 U.S. at 438-39, 100 L. Ed. at 524-25. He apparently meant that the only purpose of the privilege is to protect the witness from the hazard that his statements will be used to convict him.

use in a criminal proceeding against the witness or a criminal proceeding against third parties, or a civil damage action against third parties.

This Court has already rejected the *Ullman* analysis of the purpose of the privilege. Therefore, the time has come to discard the results which flow from that rejected analysis.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL,
Counsel for Petitioner.

R. MAX ETTER,
Of Counsel.

APPENDIX.

Opinion of the District Court.

United States District Court, Eastern District of Washington, Northern Division.

[Civil No. 2297 — February 3, 1965]

United States of America, Plaintiff vs. Carnation Company of Washington, and Inland Empire Dairy Association, Defendants.

The plaintiff has moved to compel the witness Robert E. Rutherford to testify by deposition. He has refused and claimed his Fifth Amendment privilege. Plaintiff argues that the witness has immunity which is coextensive with the privilege against self-incrimination and that his testimony may be compelled.

In March of 1962 this same witness appeared before a grand jury investigating anti-trust activities of the two defendant corporations. He refused to waive immunity and was required to testify. Another witness, a Mr. Click, did waive immunity. As a result of the grand jury proceedings the two corporations and Mr. Click were indicted.

This action is to recover double damages under the False Claims Act, 31 U.S.C.A. 231. As an alternative cause of action plaintiff seeks damages for anti-trust violation. It appears the grand jury testimony given in the original proceedings in March 1962 will become material in the trial of this case.

Plaintiff concedes in its brief on the pending motion that the questions asked of the witness, if answered, would tend to incriminate him. It asserts his testi-

mony may be compelled on deposition in this case on two grounds:

1. That he was granted immunity when he appeared before the grand jury in March 1962 and that the questions only refer to matters to which he previously testified and on which he was granted immunity, and

2. That this is a "proceeding, suit, or prosecution" referred to in 15 U.S.C.A. 32,[1] which grants immunity, and even if the original grand jury immunity does not apply, the statutory grant protects the witness and his testimony may be compelled.

The plaintiff has objected to the release of the grand jury testimony of this witness and has insisted upon its remaining secret from the defendants and their counsel. If the witness is to be compelled to testify to the same matters on which he testified before the grand jury, he must recall at his peril the extent of that investigation and testimony.

There was no blanket grant of immunity or amnesty when the witness testified before the grand jury three years ago. As stated in *United States v. Johns-Manville Corporation*, 213 F. Supp. 65, 75, there is no grant of immunity perpetually.

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[1] "§ 32. Immunity of witness

No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. Feb. 25, 1903, c. 755, § 1, 32 Stat. 904."

The witness may be called upon to testify to events that have occurred since March of 1962. If the testimony should link the witness to a later violation the earlier immunity would afford no protection. The witness may apprehend that the evidence sought might furnish a link in a chain sufficient to connect him with a more recent crime for which he might still be prosecuted. *Malloy v. Hogan,* 378 U.S. 1, 13. He would also be subjected to cross examination which would enlarge the questions now pending and explore events that occurred after the grand jury session of 1962.

The language of the immunity statute is simple. Its application to the facts and procedures in this case is difficult. No case has been cited that parallels this one. Plaintiff's counsel argues that if the grand jury immunity does not carry over to protect the witness, his testimony given in this suit is immune and therefore may be compelled under 15 U.S.C.A. 32. I must determine if this action is a proceeding, suit or prosecution within the terms of the statute.

Paragraph I of the complaint alleges that this action is maintained under the False Claims Act.[2] The sec-

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[2] "COUNT ONE

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendants, under Sections 3491 and 3492 of the Revised Statutes (31 U.S.C. Secs. 232-233) by the United States of America (hereinafter sometimes referred to as 'plaintiff') in its capacity as purchaser of milk and other milk products for use by Fairchild Air Force Base (hereinafter referred to as Fairchild), a federal military agency located in the State of Washington, for forefeitures and damages as provided by Sections 3490 and 5438 of the Revised Statutes (31 U.S.C. Secs. 231-233), commonly known as the False Claims Act."

ond cause of action alleged in the alternative is under the sections of the code referred to in 15 U.S.C.A. 32. But it is not the principal cause of action. If there is a recovery on the first, it is assumed the second cause of action would be abandoned. Plaintiff could dismiss it at any time.

Plaintiff urges that since there is a reference in the complaint to the sections cited in the immunity statute that the testimony may be compelled. I do not agree and must reject that argument. The Constitutional guarantee that one will not be compelled to give evidence against himself is a fundamental safeguard. Any statute or rule which contravenes it must be plain and unambiguous in its wording and equally so in its application to the facts of the case. Here we have an action under the False Claims Act. It is not covered by the immunity statute. I will not compel the witness to testify in this case.

The motion of plaintiff will be denied. Counsel for the witness and defendants may present an appropriate order.

Done By The Court this 3 day of February, 1965.

Charles L. Powell
United States District Judge

Order of the District Court.

United States District Court, Eastern District of Washington, Northern Division.

[Civil No. 2297 — February 25, 1965]

United States of America, Plaintiff, v. Carnation Company of Washington, and Inland Empire Dairy Association, Defendants.

The United States of America, plaintiff, having subpoenaed Robert E. Rutherford as a witness for the purpose of taking deposition testimony on November 17, 1964, at Spokane, Washington, and the said witness, Robert E. Rutherford, at said time, on the advice of counsel, having refused to answer certain questions put to him by counsel for plaintiff during the taking of said deposition; and

The United States of America, plaintiff, having thereafter, on December 3, 1964, moved the Court under Rule 37-A of the Federal Rules of Civil Procedure to order Robert E. Rutherford to answer the questions heretofore submitted at the time of deposition; and

The Court having examined and considered all of the files in this cause, particularly the deposition of Robert E. Rutherford on November 17, 1964, and the Government's Motion under Rule 37(a) thereunder, and having considered all matters in connection therewith, including the memorandums and briefs of authorities submitted by the parties, and the Court having heard the oral argument submitted by counsel for all the parties, and they having submitted said motion thereafter, and

the Court having written an Opinion and entered the same in this cause, does hereby

Order and Decree that the motion of the United States of America, plaintiff, be denied.

Done by the Court this 25 day of February, 1965.

Charles L. Powell
United States District Judge

Order of the District Court.

United States District Court for the Eastern District of Washington, Northern Division.

[Civil No. 2297 — June 23, 1965]

United States of America, Plaintiff, v. Carnation Company of Washington and Inland Empire Dairy Association, Defendants.

The United States of America, plaintiff herein, having made a motion to this Court under Rule 37(a) of the Federal Rules of Civil Procedure to order Robert E. Rutherford to answer questions put to him by counsel during the taking of the said Robert E. Rutherford's deposition on November 17, 1964 at Spokane, Washington, pursuant to subpoena issued at the request of the United States of America, plaintiff herein, and stipulation of counsel; and

The Court having examined and considered all of the files in this cause, particularly the deposition of Robert E. Rutherford on November 17, 1964, and the plaintiff's motions filed with the Court on December 4, 1964 and March 22, 1965, and having considered all matters in connection therewith; and

The Court having found that in the instant deposition Section 32 of Title 15 of the United States Code affords the witness, Robert E. Rutherford, a complete substitution for the privilege against self-incrimination provided by the Fifth Amendment of the United States Constitution, by providing the said witness with immunity from prosecution as to all past crimes revealed by the testimony given during the said proceeding, the Court does hereby

Order and Decree that the witness, Robert E. Rutherford, shall, when called, answer the questions put to him by counsel during the taking of his deposition begun on November 17, 1964.

Dated June 23, 1965.

Charles L. Powell
United States District Judge

Order of the District Court.

United States District Court, Eastern District of Washington, Northern Division.

[Misc. No. 1-1965 — June 24, 1965]

United States of America, Plaintiff, vs. Robert E. Rutherford, Defendant. Misc. 1-1965.

On Tuesday, the 17th day of November 1964, at the hour of 2:00 o'clock P.M., at the Federal Building, Spokane, Washington, the deposition of Robert E. Rutherford was taken on behalf of the plaintiff pursuant to subpoena and stipulation of counsel.

That at said time counsel for the plaintiff proposed questions to the witness Robert E. Rutherford, who invoked the Fifth Amendment of the Constitution

of the United States and declined to answer the questions proposed on the ground that the answers would tend to incriminate him.

That thereupon counsel for Inland Empire Dairy Association proposed questions to the witness Robert E. Rutherford who invoked the Fifth Amendment and declined to answer said questions on the ground that the answers might tend to incriminate him.

That thereafter the said deposition of Robert E. Rutherford was continued and proceedings were had in the United States District Courtroom in the Federal Building, Spokane, Washington, on June 23, 1965, before me.

That during said proceedings and deposition counsel for the plaintiff proposed the same questions to the witness Robert E. Rutherford that had theretofore been proposed to him on the 17th day of November 1964, and the said Robert E. Rutherford invoked the Fifth Amendment and declined to answer the questions proposed on the ground that the answers might tend to incriminate him.

That thereupon I advised the witness to answer on the ground that said witness had immunity by reason of a statute of the United States which I read to the witness, and I ordered the said witness Robert E. Rutherford to answer the questions proposed to him by counsel for the government, and the witness Robert E. Rutherford thereupon invoked the Fifth Amendment of the Constitution of the United States and declined to answer the questions proposed, or to obey my order, on the ground that the answers might tend to incriminate him.

That thereupon counsel for Inland Empire Dairy Association proposed questions to the witness Robert E.

Rutherford who invoked the Fifth Amendment and declined to answer said questions on the ground that the answers might tend to incriminate him.

That thereupon I advised the witness to answer on the ground that said witness had immunity by reason of a statute of the United States which I read to the witness, and ordered the said witness Robert E. Rutherford to answer the questions proposed by counsel for the Inland Empire Dairy Association, and the said witness Robert E. Rutherford invoked the Fifth Amendment and declined to answer the questions on the ground that the answers might tend to incriminate him.

It is the judgment of the Court that the witness Robert E. Rutherford is in contempt of this Court.

I hereby certify that I saw and heard the conduct constituting the contempt hereinabove set forth, and that it was committed in the actual presence of the Court.

It Is Ordered that the defendant Robert E. Rutherford be, and he hereby is committed to the custody of the Attorney General, or his representative, for imprisonment for a term of ninety (90) days.

It Is Ordered that the execution of said sentence be suspended pending a final order by the appropriate Appellate Court.

It Is Further Ordered and Provided that in the event this order shall be sustained on appeal, the said defendant Robert E. Rutherford shall be afforded an opportunity to purge himself of said contempt within a time of sixty (60) days from the entry of said order.

Dated this 24th day of June, 1965.

Charles L. Powell
United States District Judge

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

[No. 20, 377 — August 11, 1966]

Robert E. Rutherford, Appellant, vs. United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Before: Hamley, Merrill and Browning, Circuit Judges;

Hamley, Circuit Judge:

In this proceeding Robert E. Rutherford was adjudged to be in contempt of court, and sentenced to imprisonment, for refusing to testify by way of deposition in a pending civil suit. Rutherford appeals, asserting that he was justified in declining to testify on his claim of privilege under the Fifth Amendment. We affirm.

Rutherford is an employee of Carnation Company of Washington (Carnation), a distributor of milk and milk products. In March, 1962, he was called to testify before a United States grand jury in connection with an investigation of antitrust law violations. He refused to waive immunity and was required to testify.

The grand jury returned an indictment charging Carnation, Inland Empire Diary Association (Inland), and an official of Inland, with a conspiracy in violation of the Sherman Act in the sale of milk and milk products to Fairchild Air Force Base in Washington. All of the defendants were convicted and fined upon their pleas of *nolo contendere*.

Shortly thereafter, the United States commenced a civil suit against Carnation and Inland in the same district court to recover damages in connection with the same conspiracy. The complaint contains two counts. One of these invokes R.S. §§3491 and 3492 (1875), 31 U.S.C. §§232 and 233 (1964), commonly known as the False Claims Act. The other count is based on section 4A of the Act of October 15, 1914, as added by the Act of July 7, 1955, 69 Stat. 282, 15 U.S.C. §15a (1964), a provision of the Clayton Act.

The Government subpoenaed Rutherford for the purpose of taking his pretrial deposition in this civil suit. He appeared at the appointed time and place but refused to answer questions propounded by Government counsel, claiming his Fifth Amendment privilege against self-incrimination. He persisted in such refusal despite the assurance of Government counsel that he had immunity under the antitrust immunity statutes, 32 Stat. 904 (1903), 15 U.S.C. §32 (1964).

Pursuant to Rule 37(a), Federal Rules of Civil Procedure, the United States then moved for a court order compelling the witness to testify. The district court denied the motion, holding that the immunity statute did not apply because one of the claims stated in the complaint was founded on the False Claims Act rather than the antitrust laws.

Thereafter, this court decided *Kronick v. United States*, 9 Cir., 343 F. 2d 436, involving refusal to testify in a civil suit in which recovery of damages was sought under alternative counts, one based on the Clayton Act, and the other on section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U.S.C. §489 (1964). On the basis of that decision,

the Government moved for reconsideration of its motion made under Rule 37(a).

Upon reconsideration, the district court held that the decision in *Kronick* was dispositive and required the court to set aside the previous order. Holding that Rutherford would be afforded complete immunity under 15 U.S.C. §32, the court ordered Rutherford to answer the questions to be then put to him during the taking of his deposition in open court. When the questions were put to Rutherford, however, he again invoked the Fifth Amendment and refused to answer. The court then ordered the witness to answer the questions propounded by counsel for the Government, and for Inland, stating that he had immunity. Rutherford again declined to answer on the ground that his answers might tend to incriminate him.

In a formal order entered the next day, the district court adjudged Rutherford to be in contempt of court, and committed him to the custody of the Attorney General for imprisonment for a term of ninety days. Execution of the sentence was stayed pending appeal, it being provided that if the contempt order were sustained on appeal, Rutherford would be afforded an opportunity to purge himself within sixty days thereafter.

The immunity granted by section 32 of 15 U.S.C. applies to testimony elicited in any "proceeding, suit, or prosecution" under the antitrust statutes. Rutherford urges that a civil damage action brought by the Government pursuant to section 4A of the Clayton Act (15 U.S.C. §15[a]), does not qualify as a "proceeding, suit or prosecution" within the meaning of the immunity statute, and that his refusal to testify in this case was therefore justified.

This immunity statute was enacted in 1903 as part of an appropriation act; the entire statute is reproduced in the margin.[1] The appropriation provision of the act, by its terms, expired June 30, 1904, and only the immunity provision has been codified in 15 U.S.C. §32. However, this code provision has not been enacted into positive law which makes it necessary, in construing its terms, to resort to the original enactment. *United States v. Welden,* 377 U.S. 95, 98-99, n. 4.

The Supreme Court in *United States v. Welden,* was called upon to consider the applicability of the immunity statute to an investigation conducted by a congressional subcommittee. The Court held that the immunity granted by the statute extends only to judicial proceedings. In arriving at this conclusion, the Court found that the phrase "proceeding, suit, or prosecution" related to the phrase "in the Courts of the United States" in the immediately preceding clause of the act.

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[1] "That for the *enforcement* of the provisions of the Act entitled 'an Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts. . . ." 32 Stat. 903-904 (Emphasis added.)

Rutherford's argument is based on a similar analysis. He reasons that the phrase "proceeding, suit, or prosecution" should be modified by the word "enforcement" found in the act's introductory sentence. Accordingly, only those actions brought to enforce the antitrust laws would be covered. "Enforcement" as defined by Rutherford would relate only to criminal prosecutions, injunction and investigatory proceedings and not to civil damage actions filed by the Government. He refers to the latter actions as "remedial" only.

The Government contends that Rutherford's definition of what constitutes an enforcement action is too narrow, and that all of the actions brought by the Justice Department whether criminal or civil should be characterized as enforcement proceedings. It is urged that the antitrust responsibilities are unitary and cannot be divided between civil and criminal proceedings, or between injunction and damage suits.

Rutherford has raised a novel issue: Does the immunity statute apply in a civil damage action instituted by the Government? The defendant in *Kronick, v. United States,* 9 Cir., 343 F. 2d 436, was a witness in such a Government damage action. This court held that the immunity statute provided the necessary protection against prosecution, but there was no discussion of the issue presented here and no similar contention was raised in *Kronick*. Although the holding in *Kronick* is not dispositive of the question posed by Rutherford, we are of the opinion that the immunity statute was properly invoked in that case and that it is equally applicable in the instant case.

Our holding is based on the conclusion that a civil antitrust damage action constitutes enforcement of the

antitrust laws and is a "proceeding," or "suit" within the meaning of 15 U.S.C. §32.

These Government damage actions were authorized by Congress in 1955, due in part to a recognition of the large amount of procurement done by the Government, particularly during periods of defense mobilization. The Senate report accompanying the bill which ultimately became 15 U.S.C. §15a, contains language which makes it clear that Congress considered private antitrust actions to be of prime importance in the enforcement of the antitrust laws and the nation's antitrust policies.[2]

The Government by statute has been accorded the status of a private party for purposes of instituting damage actions. If private actions generally are viewed as vehicles for enforcing the nation's antitrust laws, it is difficult to conclude that Government damage actions do not also enforce the antitrust laws. Rutherford points out that the Government can recover only actual damages while private claimants are entitled to treble damage awards; this he asserts distinguishes the Government actions from private enforcement proceedings. The omission of a treble damage provision in the statute authorizing Government suits can be attributed to the opinion of Congress that since the Government has the basic responsibility of enforcing the antitrust laws, no special inducement to sue in the form of treble damage awards is necessary. But this distinction does not mean that the Government's actions do not enforce the antitrust laws.[3]

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[2]U.S. Code Cong. and Admin. News 1955, pp. 2329-2330.

[3]Fines in criminal antitrust cases are limited to $50,000 and it is often subsequent civil actions which make such conduct truly

(This footnote is continued on the next page)

The argument which Rutherford has constructed is based on a too narrow definition of the concept of enforcement of antitrust laws. This concept does not exclude suits for damages brought by the Government and based on antitrust violations. The fact that the Government's action is one for damages does not therefore preclude the operation of the immunity statute.

Rutherford also contends that, in any event, the immunity statute is inapplicable in the pending Government suit, due to the joinder of a claim under the False Claims Act.

In *Kronick v. United States,* 9 Cir., 343 F.2d 436, we had this to say about a similar problem:

> "Nor does Kronick contend that the immunity provided by section 32 is inapplicable in the pending civil action because only the second of the two claims involved in the suit invoked the antitrust laws, the first, and alternative, claim being brought under the Federal Property and Administrative Services Act of 1949. Such a contention would be without merit. The proof necessary to sustain both claims is substantially identical and Kronick's testimony was not separated as between the two claims. Under these circumstances it must necessarily be assumed that all of his testimony is germane to the antitrust claim and is therefore protected by section 32." 343 F.2d at 441.

Rutherford does not appear to challenge the soundness of this statement, but rather, concerns himself with dif-

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unprofitable and deter future violations. Inland and Carnation were each fined $20,000 in the criminal prosecution; the Government in its damage action is seeking to recover about $296,000 from these companies.

ferentiating the *Kronick* case from the instant case. Specifically it is argued that the proof required to establish violations of the False Claims Act is materially and substantially different from the proof necessary to establish antitrust violations, and that the scope and coverage of the laws differ substantially. In support of this proposition, Rutherford relies primarily on the fact that the False Claims Act requires proof of intent to defraud whereas fraud is not an element of an antitrust violation.

But this apparent distinction is too insubstantial to dictate a conclusion different from the one reached in the *Kronick* opinion. The non-antitrust statute in *Kronick* allows recovery for fraud in the disposal of Government property and other transactions; the False Claims Act covers generally the presentation of "false, fictitious or fraudulent" claims to the Government and conspiracies to defraud the United States by such claims. The similarity between the two statutes is significant — they both involve fraud.

The complaint in the Government's case against Inland and Carnation establishes that both counts are based on the same alleged course of conduct. The antitrust count charges an agreement to fix prices and to submit noncompetitive, collusive, rigged bids on the sale of milk and milk products to Fairchild Air Force Base. In the False Claims Act count, the Government alleges that the defendants submitted noncompetitive, collusive and rigged bids, while representing that they were competitive bidders.

The similarity between the two claims is patent, and the proof required to establish them is virtually identical. To afford Rutherford complete protection it will

be conclusively presumed, as in *Kronick,* that the testimony which the Government intends to elicit from Rutherford will be germane to the antitrust claim, thus affording him immunity as to all of this testimony in this cause.[4]

We hold that the inclusion of a claim under the False Claims Act does not, in this case, render the antitrust immunity statute inapplicable.

Rutherford raises an additional argument to the effect that his refusal to answer the Government's questions was justified because of the possibility that his answers would involve him in crimes committed subsequent to his grand jury testimony. He states that the immunity granted by 15 U.S.C. §32 extends only to those crimes disclosed by him before the grand jury, which were committed on or before the date of his testimony before the grand jury.

This argument involves a *non sequitur.* Our concern is with the immunity granted by 15 U.S.C. §32 in the civil damage action and not with the immunity granted Rutherford in the grand jury proceedings. Section 32 of 15 U.S.C., as applied in this case, will protect Rutherford against prosecution for crimes based on his testi-

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[4] A trial court determination that, because of the similarity between a non-antitrust claim and a joined antitrust claim, all testimony received in the cause will be conclusively presumed to be germane to the antitrust claim and therefore protected by the immunity statute (15 U.S.C. §32), is in actuality a ruling in favor of a witness seeking to safeguard his Fifth Amendment privilege against self-incrimination. It is not necessary for such a witness to obtain appellate confirmation of such a ruling, though the expedient of contempt proceedings, for acquiescence in such ruling, and the giving of testimony subject to the immunity thus afforded, is binding upon all federal and state prosecuting officals. See *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 53, note 1, 77-79.

mony in the civil damage suit, other than perjury committed in such suit. This immunity covers any past crimes including those subsequent to the grand jury proceeding which may be disclosed by his testimony. Rutherford's fears that 15 U.S.C. §32 provides inadequate protection against prosecution for possible past crimes are unfounded, and his argument based on these fears is without merit.

Finally, Rutherford urges that this court should rule that the immunity statute involved in this case is contrary to the Fifth Amendment and therefore unconstitutional. In view of the Supreme Court's position regarding the constitutionality of immunity statutes generally (*Ullmann v. United States,* 350 U.S. 422), we think that such a ruling is unwarranted. Nor do we perceive, as Rutherford does, the indication of a new doctrinal trend in matters concerning the Fifth Amendment which would undermine the validity of *Ullman.*

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 654

ROBERT E. RUTHERFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10–19) is reported at 365 F. 2d 353. The district court's orders (Pet. App 1–9) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1966. On September 27, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including October 10, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

288-774—66——1

QUESTIONS PRESENTED

1. Whether the provisions of the Antitrust Immunity Statute are applicable to a civil suit by the United States under Section 4A of the Clayton Act to recover damages in respect of conduct forbidden by the antitrust laws.

2. Whether the Antitrust Immunity Statute is valid under the Fifth Amendment.

STATUTES INVOLVED

The Antitrust Immunity Statute, 15 U.S.C. 32, provides as follows:

> No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1–7 of this title [Sherman Act] and all Acts amendatory thereof or supplemental thereto * * *: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

The original language of the statute (32 Stat. 903–904), along with Section 4A of the Clayton Act, 69 Stat. 282, 15 U.S.C. 15a, are set forth on pages 3–4 of the petition for certiorari.

STATEMENT

During a deposition in an action for damages by the United States under Section 4A of the Clayton Act and the False Claims Act (R.S. 3491, 3492, 31 U.S.C. 232, 233), petitioner refused to answer ques-

tions after being ordered by the court to do so, and was sentenced to imprisonment for contempt.

The suit was against Carnation Company of Washington and Inland Empire Dairy Association and sought recovery of damages suffered by the government as a result of rigged bidding in the sale of milk and dairy products to the United States. Earlier, in 1962, Carnation, Inland and an Inland officer had been indicted under the Sherman Act (15 U.S.C. 1) for conspiring to fix prices on sales of milk and milk products to Fairchild Air Force Base in Washington, and petitioner, an officer of Carnation, had testified before the grand jury that returned the indictment and had obtained immunity as provided by the Antitrust Immunity Statute. The defendants in the criminal proceeding pleaded *nolo contendere* and were fined (Pet. App. 10). This civil suit followed. The complaint contained counts under both Section 4A of the Clayton Act and the False Claims Act (Pet. App. 11). The antitrust count charged a conspiracy to fix prices and to submit noncompetitive, collusive and rigged bids on milk and milk products in violation of Section 1 of the Sherman Act (Pet. App. 17). The False Claims Act count charged that defendants had falsely represented that they were competitive bidders. Both counts arose from the same conduct.

On November 17, 1964, petitioner was subpoenaed by the government for a pre-trial deposition. Claiming the Fifth Amendment's privilege against self-incrimination, he refused to answer certain questions even though government counsel assured him that he had statutory immunity. The government moved the

district court under F.R. Civ. P. 37(a) to order him to answer. The court denied the motion on the ground that the Antitrust Immunity Statute was inapplicable since one count of the complaint was under the False Claims Act. After the court of appeals for the circuit said in *Kronick* v. *United States,* 343 F. 2d 436 (C.A. 9), that the immunity statute applied to civil damage actions in which alternative counts are stated under the Clayton Act and a false claims statute, so long as the proof required to sustain both claims is substantially identical, the government asked the district court to reconsider; and, in the light of the court of appeals' ruling, the district court reversed itself and held that the statutory immunity applied and would afford petitioner protection from prosecution for all past crimes revealed by his deposition.

On June 23, 1965, the deposition was resumed before the district court, but petitioner persisted in his refusal to answer questions on the ground that his answers might tend to incriminate him. The court read the immunity statute to petitioner, explained to him that he would be immune from prosecution by reason of the statute, and ordered him to answer. Petitioner refused to obey the court's order. The court certified that it had seen and heard, in its presence, petitioner's contemptuous conduct, and it sentenced him to imprisonment for a term of ninety days. Execution of judgment was suspended, however, for a period of sixty days following affirmance of the order on appeal in order to afford petitioner an oppor-

tunity to purge himself of his contempt (Pet. App. 7–9).

The Court of Appeals for the Ninth Circuit affirmed (Pet. App. 10–19). It held that the Antitrust Immunity Statute is applicable in a civil damage suit by the United States under Section 4A of the Clayton Act (Pet. App. 14) because such damage actions are "proceedings" or "suits" to enforce the antitrust laws within the meaning of the immunity statute; and that the inclusion of an alternative claim for relief under the false Claims Act did not render the immunity statute inapplicable, where, as here, the claims were based upon the same conduct and the proof required to establish them would be substantially identical. It held specifically that petitioner's immunity would cover "any past crimes including those subsequent to the grand jury proceeding which may be disclosed by his testimony" (Pet. App. 19). Finally, citing *Ullmann* v. *United States*, 350 U.S. 422, the court held that the immunity statute does not contravene the Fifth Amendment.

ARGUMENT

1. The Antitrust Immunity Statute grants immunity to a witness testifying in any proceeding under the Sherman Act "and all Acts amendatory thereof or supplemental thereto" (15 U.S.C. 32). Petitioner refused to testify in a proceeding under Section 4A of the Clayton Act. We believe that Section 4A is plainly supplemental to the Sherman Act, most clearly where, as here, the basis of the Section 4A action is a violation of the Sherman Act. In such

a case Section 4A operates simply to give the government a damages remedy for Sherman Act violations.[1] How more plainly to supplement the Sherman Act than by providing an additional remedy for its enforcement?[2]

2. Petitioner misconstrues the court of appeals' decision when he suggests (Pet. 8–9) that it has extended the immunity statute to damages actions instituted by private litigants. The only issue decided by the court of appeals was, in its words: "Does the immunity statute apply in a civil damage action instituted by the Government" (Pet. App. 14). The court of appeals did not decide that the immunity statute applies to private suits. The original language of the statute (32 Stat. 903; Pet. 3) appears to confine immunity to testimony given in suits by the government. *H. Wagner & Adler Co.* v. *Mali*, 74 F. 2d 666, 670 (C.A. 2). But that issue was not decided below and clearly need not be reached here.

3. Petitioner's contention that he enjoys only partial immunity is unfounded. He evidently fears that he will not have immunity so far as testimony with respect to the False Claims Act phase of the case is concerned. But the court of appeals has expressly

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[1] In *United States* v. *Cooper Corp.*, 312 U.S. 600, this Court held that the United States was not authorized to sue under the Sherman Act for damages to itself. Section 4A provided such authority. See H. Rep. No. 422, 84th Cong., 1st Sess.; S. Rep. No. 619, 84th Cong., 1st Sess.

[2] The legislative history shows that Congress explicitly regarded Section 4A as an additional weapon for enforcing the antitrust laws, especially Section 1 of the Sherman Act. See S. Rep. No. 619, *supra*; H. Rep. No. 422, *supra*, pp. 2–5.

ruled that petitioner will enjoy immunity as to all testimony he may give in this case (Pet. 17–18), in view of the substantial identity in the proof necessary to establish the antitrust and the false-claims counts. See *Kronick* v. *United States*, 343 F. 2d 436, 441 (C.A. 9). *H. Wagner & Adler Co.* v. *Mali*, *supra*, is not opposed. It was not a case involving dual claims based upon the same conduct, in a suit brought by the United States. Its holding—that the Antitrust Immunity Statute does not apply to testimony in private damages actions to enforce the antitrust laws—is inapposite.

4. Finally, there is no occasion to examine further the constitutionality of the immunity statutes. The validity of such statutes under the Fifth Amendment was upheld by this Court 70 years ago (*Brown* v. *Walker*, 161 U.S. 591), and reaffirmed after full consideration as recently as 10 years ago (*Ullmann* v. *United States*, 350 U.S. 422). Neither *Miranda* v. *Arizona*, 384 U.S. 436, nor *Tehan* v. *Shott*, 382 U.S. 406, casts doubt upon the constitutionality of immunity statutes. *Tehan* was concerned only with retrospective application of this court's decision in *Griffin* v. *California*, 380 U.S. 609, that adverse comment on a defendant's failure to testify in a State prosecution violates the privilege against self-incrimination, and *Miranda* was concerned with standards for protection of the privilege against self-incrimination when prosecuting authorities obtain statements from suspects under arrest.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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Assistant Attorney General.

HOWARD E. SHAPIRO,
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NOVEMBER 1966.

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IN THE

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No. 654

ROBERT E. RUTHERFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Centiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1966
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vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Centiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

1. The Government Has Erroneously Asserted That the Antitrust Immunity Statute Covers All Testimony in All Proceedings Under the Antitrust Laws.

The Government's assertion in Paragraph 1 of its Argument (Bf. 5) appears to be based upon the Government's reading of 15 U.S.C. § 32. The Government relies upon the wrong statute. Section 32 is not the Antitrust Immunity Statute; Section 32 is merely the codifier's paraphrase of the Antitrust Immunity Statute. (See Footnote 4 of this Court's opinion in *United States v. Welden* (1964), 377 U.S. 95, 98, 152 L. Ed. 2d 152, 157.) The Antitrust Immunity Statute which Congress enacted in 1903 is found at 32 Stat. 903-04. (Pet. 3.) The courts have always looked to the full text of 32 Stat. 903-04 in order to determine whether particular testimony is covered by the Immunity Stat-

ute and have frequently concluded from such an examination that Congress only intended to provide immunity for certain testimony in certain types of antitrust proceedings. See *United States v. Standard Sanitary Mfg. Co.* (E.D. Pa. 1911), 187 Fed. 232; *H. Wagner & Adler Co. v. Mali* (2d Cir. 1935), 74 F. 2d 666; *United States v. Welden, supra.* The Government apparently acknowledges in the second paragraph of its argument that the Immunity Statute does not apply to all proceedings under the antitrust laws. The Government says that immunity "appears" to be confined "to testimony given in suits by the Government." (Br. 6) The question of the applicability of the Immunity Statute to Section 4A proceedings cannot be resolved by a simplistic reading of the wrong statute. Therefore, the first paragraph of the Government's Argument should be disregarded.

2. The Court of Appeals Did Decide That Private Damage Actions Are Covered by the Immunity Statute.

The Court of Appeals concluded that immunity extends to enforcement proceedings. (Pet. App. 13-14.) Then it said: "Our holding is based on the conclusion that a civil antitrust damage action constitutes enforcement of the antitrust laws and is a 'proceeding' or 'suit' within the meaning of 15 U.S.C. § 32." (Pet. App. 14-15.) Then it reasoned that as private actions are enforcement proceedings, Government damage actions are also enforcement proceedings. (Pet. App. 15.)

If a court has determined a question of law and its determination of that question is essential to its decision in the case before it, it must be concluded that that court has decided that question of law. If the decision stands, the above holding will be used and relied upon in every private damage suit brought throughout the nation. This holding of the Court of Appeals for the Ninth Circuit is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *H. Wagner & Adler Co. v. Mali, supra.*

3. The Government Ignores the Immunity Problems Created by Cross-Examination and by the Joinder of False Claims Act and Clayton Act Claims.

The Government ignores two important facts: First, the case against Carnation and Inland has not yet been tried and no one can now tell whether the evidence as to the False Claims Act claim will completely overlap the evidence as to the Section 4A claim. If the answers pertain only to the Government's claim under the False Claims, Rutherford does not have immunity. Second, Rutherford has been ordered to answer questions put by Inland's counsel and it is apparent from the questions that Inland seeks to prove that Rutherford committed perjury before the grand jury. (Pet. 7.) If Rutherford answers questions put by Inland's counsel, he may not have immunity under the Immunity Statute. The Government ignores Rutherford's dilemma, but he cannot ignore it. He will go to

jail if he does not answer the questions; he may go to jail if he does answer them.

4. The Government Has Misstated the Constitutional Question.

The Government incorrectly assumes that Rutherford is challenging the validity of the Antitrust Immunity Statute. (Br. 2.) Rutherford is not contesting the power of Congress to grant immunity in exchange for testimony. Rutherford is contesting the court's power to compel testimony from a witness who is unwilling to accept that bargain. Rutherford contends that such compulsion fails to protect his Fifth Amendment right to preserve his dignity and privacy, a right which this Court recognized in *Tehan v. Shott* (1966), 382 U.S. 406, 15 L. Ed. 2d 453, and *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694.

Respectfully submitted,

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Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 654

ROBERT E. RUTHERFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner presents his petition for rehearing of this Court's order denying the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which became final on August 11, 1966, and in support of such petition, respectfully shows:

The Court should reconsider its order in denying a petition for writ of certiorari because:

1. Since 1955 the government of the United States has been entitled to file civil actions for damages sustained in violation of antitrust laws. §4A, Clayton

Act; 15 U.S.C. § 15a.) The decision in *Rutherford v. United States of America* holds that the government may grant immunity in such a civil suit. The Ninth Circuit has so held. This is a procedure of such extreme importance to the business interest of the nation that the rule should be declared by the Supreme Court of the United States.

2. The reasoning of the Court required a holding that a civil antitrust damage action constitutes enforcement of the antitrust laws and is a proceeding or suit within the meaning of the Antitrust Immunity Statute (15 U.S.C. § 32).

> "Our holding is based on the conclusion that a civil antitrust damage action constitutes enforcement of the antitrust laws and is a 'proceeding,' or 'suit' within the meaning of 15 U.S.C. § 32.
>
> . . .
>
> The Senate report accompanying the bill which ultimately became 15 U.S.C. § 15a, contains language which makes it clear that Congress considered private antitrust actions to be of prime importance in the enforcement of the antitrust laws and the nation's antitrust policies.
>
> The Government by statute has been accorded the status of a private party for purposes of instituting damage actions. If private actions generally are viewed as vehicles for enforcing the nation's antitrust laws, it is difficult to conclude that Government damage actions do not also enforce the antitrust laws. . . ." (Appendix, Pet. for Writ of Certiorari, pp. 14, 15.)

Lawyers and legal writers have always assumed that the Antitrust Immunity Statute could not be applied to a civil proceeding. This appeared to be the holding in *H. Wagner & Adler Co. v. Mali*, 74 F. 2d 666. The above statement by the Court of Appeals for the Ninth Circuit creates a conflict between the circuits. Some circuits may apply the Antitrust Immunity Statute to private suits, others may not. The language of the opinion of the Ninth Circuit would appear to permit a plaintiff in a private antitrust suit to grant immunity to witnesses. Such uncertainty can only be relieved by a decision of this Court.

Conclusion.

Petitioner requests this Petition for Rehearing be granted so that the Court may resolve this important question of law as to whether or not the Antitrust Immunity Statute applies to civil antitrust proceedings.

Respectfully submitted,

JOSEPH A. BALL,
BALL, HUNT & HART,
Counsel for Petitioner.

R. MAX ETTER,
Of Counsel.

Certificate of Counsel.

I, Joseph A. Ball, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified above.

JOSEPH A. BALL,
Counsel for Petitioner.